

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

THE ESTATE OF DAVID SHAFER,
and COLLEEN SHAFER, an
individual,

Plaintiffs,

THE CITY OF SPOKANE, a
municipal corporation.

Defendant.

NO. 2:22-CV-0220-TOR

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

V.

THE CITY OF SPOKANE, a
municipal corporation,

Defendant.

BEFORE THE COURT is Defendant's motion for summary judgment (ECF

No. 30). This matter was submitted for consideration without oral argument. The

16 | Court has reviewed the record and files herein and is fully informed. For the

reasons given below, Defendant's motion for summary judgment is **GRANTED**.

BACKGROUND

19 This motion for summary judgment arises out of the fatal police shooting of
20 David Shafer. ECF No. 17 at 8, ¶ 4.28. Because these issues present themselves in

1 the posture of a motion for summary judgment, the Court will view all facts and
2 draw all reasonable inferences therefrom in the light most favorable to Plaintiffs as
3 the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). The record also
4 contains video footage taken from the shooting officer's Axon body camera. ECF
5 No. 32-2. Where the video evidence affirmatively contradicts Plaintiffs' version of
6 the facts, the Court will not credit Plaintiffs' assertions. *Vos v. City of Newport*
7 *Beach*, 892 F.3d 1024, 1028 (9th Cir. 2018) (citing *Scott*, 550 U.S. at 378-79).
8 However, the existence of video footage itself will not "foreclose a genuine factual
9 dispute as to the reasonable inferences that can be drawn from that footage." *Id.*
10 (citing *Scott*, 550 U.S. at 380).

11 FACTS

12 Mr. Shafer and his wife, Plaintiff Colleen Shafer, lived and raised their five
13 children here in Spokane, Washington. *Id.* at 4, ¶4.3. Mr. Shafer and his wife
14 were religious people, and in addition to attending regular church services, Mr.
15 Shafer also frequently met with a men's small group led by church elder David
16 Palmer. *Id.* at ¶4.5; *see also* ECF No. 36-2 at 4, 2:00.

17 As a child, Mr. Shafer was the victim of physical and sexual abuse. ECF
18 No. 17 at 4, ¶4.1. In adulthood, he struggled with depressive disorder, suicidal
19 ideation, and alcoholism. *Id.* at ¶4.2; ECF No. 38 at 2, ¶¶ 5-7. Mr. Shafer was
20

1 also physically disabled due to a back injury from his years of hard labor as a
2 welder. ECF No. 17 at 4, ¶ 4.4.

3 Mr. Shafer's family and church community knew of his mood and substance
4 abuse disorders. ECF No. 36-2 at 4-5, ¶ 2:15. When Mr. Shafer first disclosed to
5 Mr. Palmer and his pastor, Bill Putnam, that he was experiencing suicidal ideation,
6 Mr. Palmer took what he believed to be all of Mr. Shafer's weapons and stored
7 them in his own home garage. *Id.* Mr. Shafer was also set to begin inpatient
8 alcohol treatment at the end of October 2019. *Id.* at 5, ¶ 4.6.

9 On October 23, 2019, while his wife and children were out of the home at
10 work and school, Mr. Shafer began binge drinking. *Id.* at ¶ 4.8. As he grew
11 increasingly intoxicated, Mr. Shafer also began to experience suicidal ideation. *Id.*
12 at ¶ 4.10. In the early afternoon, he called Mr. Palmer for assistance, saying he
13 "wanted to go be with God" and "that he had a . . . 9-millimeter . . . he'd been
14 putting [to] his head." ECF No. 36-2 at 6, 4:38. Accompanied by Pastor Putnam,
15 Mr. Palmer loaded up his truck and began the drive to Mr. Shafer's neighborhood.
16 *Id.* Mr. Palmer kept Mr. Shafer on the phone for most of the ride, while Pastor
17 Putnam placed a separate call to 911. *Id.* Pastor Putnam reported that Mr. Shafer
18 was suicidal, had a firearm, and was intoxicated. ECF No. 31-2 at 2.

19 On the way to Mr. Shafer's home, Mr. Palmer took a fortuitous wrong turn
20 and encountered Mr. Shafer—who had decided he no longer wanted assistance—

1 walking along the street. ECF No. 36-2 at 6, 4:38. According to Mr. Palmer,

2 [H]e reached behind his back and pulled out the 9 millimeter, and he
3 didn't point it at us, but he was kind of waving it around and stumbling
4 because he was very drunk. He got in the car with the weapon, . . . got
5 in the backseat and was thrashing around quite a little bit. Yelling quite
6 a lot, it was a violent situation, Bill . . . had grabbed his right arm and
7 pulled it forward so that he was sort of pinned down just a little bit. I
was in the driver's seat trying to get the gun away from him, and I was,
you know, speaking loudly to him, give me the gun, right, give me the
gun, and [] he said no, I'm, not going to give you the gun, [and] I said
you're going to give me the gun, and I reached back there and, and he,
he actually let it go.

8 *Id.* at 6-7, 4:38

9 Mr. Palmer then stored the gun in the glove compartment. *Id.* Meanwhile,
10 Mr. Shafer jumped out of the car and began walking back up towards his home.
11 *Id.* Mr. Palmer observed that he was stumbling and weaving around. *Id.* Mr.
12 Shafer expressed that he had another .22 millimeter gun in his home and was
13 "gonna get that and finish this off." *Id.* Mr. Palmer and Pastor Putnam continued
14 to slowly follow him back up the street in their truck before stopping about 50
15 yards outside his home. *Id.*

16 At that point, Spokane police officer Caleb Martin had arrived on scene after
17 receiving a call from dispatch. ECF No. 32-1 at 2, ¶ 3. Officer Martin averred that
18 he knew Mr. Shafer to be suicidal and intoxicated, and knew that he had past
19 suicide attempts. *Id.* Officer Martin was concerned because Mr. Shafer's home
20 was in a residential area within one block of an elementary school, which was in

1 session at the time. *Id.* at ¶¶ 4, 6. Believing the threat to be serious “enough to
2 warrant a three officer response,” he called for backup. *Id.* at ¶ 2.

3 The body camera footage shows that it was a sunny day, visibility was clear,
4 and background noise was minimal. *See generally* ECF 32-2. Officer Martin
5 arrived on scene at approximately 1:40 p.m. and parked his patrol vehicle at the
6 end of the street. *See* 32-1 at 3, ¶ 10; *see also generally* ECF 32-2. He took his
7 long rifle out of the car with him. ECF Nos. 32-1 at 3, ¶ 11; 32-2 at 5:07.

8 As he was walking up the street, Officer Martin encountered Mr. Palmer and
9 Pastor Putnam, who were still in their truck. ECF No. 32-2 at 5:12. They relayed
10 that Mr. Shafer was “at his house” and “completely out of it.” *Id.* at 5:14. Mr.
11 Palmer added, “I wouldn’t go in alone if I were you.” *Id.* at 5:25-5:27. They gave
12 the gun they had wrested from Mr. Shafer to Officer Martin, but added that they
13 believed he had other guns in the home. *Id.* at 5:28-5:32. Officer Martin secured
14 the gun in his patrol vehicle. *Id.* at 6:12.

15 After storing the gun, Officer Martin stood near Mr. Palmer’s truck. *Id.* at
16 8:00. The window was down and Mr. Palmer had Mr. Shafer on speaker phone, so
17 the conversation between them could be heard by Officer Martin. *Id.*; *see also*
18 ECF No. 36-2 at 8, 9:50. Mr. Palmer asked Mr. Shafer, “Where are you right now,
19 are you at the house?” ECF No. 32-2 at 8:00-8:02. Mr. Shafer replied, “I’m sitting
20 on the front step waiting for the cops with the .22 semiautomatic [pistol] that my

1 father gave me." *Id.* at 8:02-8:10. Officer Martin relayed this statement to
2 dispatch as he stepped away from the truck, adding that he could see Mr. Shafer
3 sitting on his front steps. *Id.* at 8:12-8:20. As Officer Martin was speaking to
4 dispatch, Officer Daniel Cole arrived and parked in front of Officer Martin's
5 vehicle. *Id.* at 8:16.

6 Mr. Palmer kept Mr. Shafer on the phone, who was distressed that Mr.
7 Palmer and Pastor Putnam were no longer nearby where he could see them from
8 his driveway. ECF No. 36-2 at 8, 9:50. Mr. Palmer responded,

9 [N]o, we didn't leave you. We're righthere. We got eyes on you. And
10 [Mr. Shafer] said, well, then if you got eyes on me, what am I doing
right now? And I said, well, I can't actually see you . . . but I can see
11 your truck,¹ and so at that point, he walked out and got . . . near the bed
of the truck.

12 *Id.*

13 Because he had walked away while speaking to dispatch and was lingering
14 next to his patrol vehicle, Officer Martin's body camera did not capture Mr. Shafer
15 discuss his position on the driveway with Mr. Palmer. *See generally* ECF No. 32-2
16 at 8:12-9:27. The Court infers that, based on his position and worn video footage,
17 Officer Martin did not overhear this exchange. *Scott*, 550 U.S. at 378.

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20 ¹ Mr. Shafer's truck was parked in his driveway. ECF No. 36-2 at 9, 10:29.

1 For approximately one minute, Officer Martin stood near his patrol vehicle
2 after phoning dispatch. ECF No. 32-2 at 8:12-9:27. During this time, he did not
3 speak to or otherwise communicate with Officer Cole, who remained in his car. *Id.*

4 After about a minute of standing near his patrol car, Officer Martin began
5 walking towards Mr. Shafer's home with his rifle drawn. *Id.* at 9:27-9:40. Officer
6 Martin positioned himself behind a small sedan two driveways to the east of where
7 Mr. Shafer was standing. *Id.* at 9:44-9:47.

8 The video footage shows that Mr. Shafer stood at the bed of his truck, facing
9 the west with his right arm raised, holding the .22 caliber pistol. *Id.* at 9:46-9:49.
10 Directly across from Mr. Shafer's position in the driveway were a row of homes,
11 although it does not appear that any of those neighbors were outside at the time.
12 *Id.* Mr. Shafer did not appear to notice yet that Officer Martin was standing to his
13 side. *Id.*

14 Officer Martin did not identify himself, but yelled, "DROP THE GUN!
15 HEY! DAVID! DROP IT!" *Id.* at 9:47-9:49. Hearing the command, Mr. Shafer
16 turned around and faced Officer Martin, lowering the arm holding the gun to his
17 side. *Id.* at 9:50. Officer Martin loudly commanded, "DROP IT RIGHT NOW!"
18 *Id.* at 9:52. The next second, however, Mr. Shafer raised the gun in Officer
19 Martin's direction. *Id.* at 9:53. Almost instantaneously, Officer Martin fired his

1 first shot at Mr. Shafer, who collapsed. *Id.* at 9:54. Officer Martin then fired a
2 second shot. *Id.* at 9:55-56.

3 Officer Cole, who had positioned himself several paces behind Officer
4 Martin during this encounter, approached him, along with a third officer, Charles
5 Pavlischak, who had arrived sometime in the interim. *Id.* at 10:40-11:11; ECF 37-
6 1 at 13 (141) Officer Martin returned to his patrol car, secured the rifle, and
7 retrieved a medical aid kit. ECF 32-2 at 11:50-12:00. The Fire Department
8 responded shortly thereafter to administer first aid. *Id.* at 14:41.

9 Mr. Shafer died from his injuries. The .22 pistol which he had been
10 brandishing was later found to be unloaded. ECF No. 36 at 2.

DISCUSSION

12 The Court understands that this case presents competing interests which
13 extend beyond the individual claims implicated in this action and which color the
14 backgrounds of the parties' respective briefs. As has been expressed time and
15 again, the sometimes hazardous nature of police work forces law enforcement to
16 make tactical judgments that can have fatal or other less-lethal but nevertheless
17 severe consequences. At the same time, it is axiomatic that officers have an
18 obligation to avoid the deployment of deadly force when alternative means could
19 be reasonably relied upon to deescalate a situation. The narrow task before the

1 Court is not, however, to resolve these complex matters of public policy, but to
2 answer the following questions:

- 3 1. Whether Defendant violated the Americans with Disabilities
4 Act (ADA);
- 5 2. Whether Defendant violated the Rehabilitation Act; and
- 6 3. Whether Defendant acted negligently in violation of
7 Washington State law.

8 *See* ECF No. 17 at 10-15.

9 In this case, the Court finds that Plaintiffs have not stated a claim under the
10 ADA, because Mr. Shafer was not disabled under Title II and posed a direct threat
11 to the public and the responding officers such that he could not be reasonably
12 accommodated. For the same reasons, the Rehabilitation Act claim—which
13 requires a virtually identical analysis—is also unsuccessful. The Court takes no
14 position as to Plaintiffs’ state law negligence claim, which it dismisses without
15 prejudice.

16 **A. Summary Judgment Standard**

17 The Court begins with a review of the summary judgment principles that
18 govern its analysis of this case. The Court may grant summary judgment in favor
19 of a moving party who demonstrates “that there is no genuine dispute as to any
20 material fact and that the movant is entitled to judgment as a matter of law.” FED.

1 R. Civ. P. 56(a). In ruling on a motion for summary judgment, the Court must only
2 consider admissible evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764,
3 773 (9th Cir. 2002). The party moving for summary judgment bears the initial
4 burden of showing the absence of any genuine issues of material fact. *Celotex*
5 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-
6 moving party to identify specific facts showing there is a genuine issue of material
7 fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “The mere
8 existence of a scintilla of evidence in support of the plaintiff’s position will be
9 insufficient; there must be evidence on which the jury could reasonably find for the
10 plaintiff.” *Id.* at 252.

11 For purposes of summary judgment, a fact is “material” if it might affect the
12 outcome of the suit under the governing law. *Id.* at 248. Further, a dispute is
13 “genuine” only where the evidence is such that a reasonable jury could find in
14 favor of the non-moving party. *Id.* The Court views the facts, and all rational
15 inferences therefrom, in the light most favorable to the non-moving party. *Scott*,
16 550 U.S. at 378. Summary judgment will thus be granted “against a party who
17 fails to make a showing sufficient to establish the existence of an element essential
18 to that party’s case, and on which that party will bear the burden of proof at trial.”
19 *Celotex*, 477 U.S. at 322.

20 //

1 **B. Americans with Disabilities Act Claim**

2 Under the ADA, courts adjudicate challenges to adverse employment
3 decisions, educational barriers, housing accommodations, and more. Increasingly,
4 but less commonly, courts in the Ninth Circuit have also permitted plaintiffs to
5 bring suit under the ADA for the actions of law enforcement. In *Sheehan v. City &*
6 *Cnty. of San Francisco*, the Ninth Circuit sanctioned plaintiffs with disabilities to
7 sue under Title II of the ADA for both “(1) wrongful arrest, where police wrongly
8 arrest someone with a disability because they misperceive the effects of that
9 disability as criminal activity; and (2) reasonable accommodation, where, although
10 police properly investigate and arrest a person with a disability for a crime
11 unrelated to that disability, they fail to reasonably accommodate the person’s
12 disability in the course of investigation or arrest, causing the person to suffer
13 greater injury or indignity in that process than other arrestees.” 743 F.3d 1211,
14 1232 (9th Cir. 2014), *rev’d in part, cert. dismissed in part sub nom, City & Cnty. of*
15 *San Francisco, Calif. v. Sheehan*, 575 U.S. 600 (2015). To stake a successful Title
16 II claim, a plaintiff must establish that: (1) they are an individual with a disability;
17 (2) they are otherwise qualified to participate in or receive the benefit of a public
18 entity’s services, programs or activities; (3) they are either excluded from
19 participation in or denied the benefits of the entity’s services, programs, or
20 activities, or otherwise discriminated against by the entity; and (4) such exclusion,

1 denial of benefits, or discrimination was because of their disability. *Id.*
2 “Discrimination includes a failure to reasonably accommodate a person’s
3 disability.” *Id.* at 1231. Plaintiffs bringing a reasonable accommodation claim
4 under the ADA must “produc[e] evidence of the existence of a reasonable
5 accommodation,” which the entity may defeat by showing that “the modifications
6 would fundamentally alter the nature of the service, program, or activity.” *Id.* at
7 1233 (quotations and citations omitted).

8 In *Sheehan*, the plaintiff suffered from schizoaffective disorder and lived in
9 a group home with other persons coping with mental illnesses. *Sheehan*, 743 F.3d
10 at 1217; *see also* 575 U.S. at 603. The plaintiff’s bedroom was located on the
11 second floor, and the only way in or out of her room was through her door to the
12 second-floor hallway. 743 F.3d at 1218.²

13 When the plaintiff threatened her social worker with a knife and refused to
14 submit to a welfare check, the social worker cleared the building of other residents
15 and sought police assistance in transporting her to a mental health facility under a
16 California regulation that allows mental health professionals to initiate a temporary
17 detention of “gravely disabled” individuals for psychiatric evaluation and

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² There was a window in Plaintiff’s room, but “it could not be used as a
20 means of egress without a ladder.” 743 F.3d at 1218.

1 treatment. *Id.* at 1217. To qualify as gravely disabled, a person must be unable to
2 for her “basic personal needs for food, clothing, or shelter” due to a mental
3 disorder. *Id.* at 1217-18.

4 Two officers contacted the plaintiff in her room, who stood up from her bed
5 and advanced towards them with a knife in her hand, warning them to get out and
6 threatening to kill them. *Id.* at 1219. The officers retreated and decided to call for
7 backup, but instead of waiting for backup, decided to force reentry based on a
8 concern that plaintiff had an avenue of escape or access to other weapons which
9 they were unaware of. *Id.* A physical altercation ensued, and plaintiff was shot
10 and injured. *Id.* at 1220.

11 Plaintiff filed suit against the city and county of San Francisco, the police
12 chief, and the individual police officers involved in her arrest, alleging, among
13 other claims, that defendants had violated the ADA. *Id.* at 1220. On appeal, the
14 Ninth Circuit held that the plaintiff had properly raised a reasonable
15 accommodation claim under the ADA by alleging that officers forced their way
16 into her room without accounting for her mental illness or employing tactics that
17 may have deescalated the situation. *Id.* at 1232-33. Reasoning that “the
18 reasonableness of an accommodation is ordinarily a question of fact,” the court
19 declined to grant defendants judgment as a matter of law on the ADA claim. *Id.*

1 Although certiorari was granted to resolve a circuit split regarding whether
2 mentally disabled claimants could bring a failure to accommodate claim against
3 law enforcement under Title II of the ADA, the Supreme Court ultimately did not
4 reach the question because petitioners abandoned the issue in their briefing. *See*
5 *City & Cnty. of San Francisco*, 575 U.S. at 608. Instead, petitioners effectively
6 conceded that a reasonable accommodation claim could be raised under the ADA,
7 but argued that Title II does not apply when individuals ““pose a direct threat to
8 the health or safety of others.”” *Id.* at 608-9 (quoting 28 C.F.R. § 35.139(a)
9 (2014)). Because the direct threat issue had not been raised in the petition for
10 certiorari, however, the Court declined to answer the question of whether a direct
11 threat exception existed. *Id.* at 610. The Court also declined to reach whether the
12 ADA applies to arrests in the first instance, citing a lack of adversarial briefing. *Id.*
13 Therefore, as both parties concede, disabled claimants may continue to bring ADA
14 reasonable accommodation claims based on law enforcement actions in the Ninth
15 Circuit. *See* ECF Nos. 30 at 14; 35 at 10.

16 Defendant argues that Mr. Shafer cannot prevail under the ADA because he
17 was not disabled, not discriminated against, and posed a direct threat to his
18 community and Officer Martin. ECF No. 30 at 7-19. Plaintiffs respond that Mr.
19 Shafer was disabled. ECF No. 35 at 10-11. While they do not disclaim that Mr.
20 Shafer posed a direct threat to Officer Martin when he began to point his gun at

1 him, they argue instead that he was denied of accommodation in the events
2 preceding his aiming of the weapon, such as by Officer Martin failing to wait for
3 backup or communicate with Mr. Shafer over the phone. *Id.* at 15-17.

4 **1. Mr. Shafer was not disabled under the ADA.**

5 The Court agrees with Defendants that Mr. Shafer was not disabled within
6 the meaning of the ADA. Whether a person is disabled under the ADA is an
7 individualized inquiry. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999),
8 *overturned on other grounds due to legislative action*. A person is disabled for
9 purposes of the ADA if they have “(A) a physical or mental impairment that
10 substantially limits one or more of the major life activities of such individual; (B) a
11 record of such an impairment; or (C) [are] regarded as having such an
12 impairment.” 42 U.S.C. § 12102(1). A mental impairment may include a stress or
13 depressive disorder. *Snead v. Metro. Prop & Cas. Ins. Co.*, 237 F.3d 1080, 1088
14 (9th Cir. 2001). Additionally, a drug or alcohol addiction may also qualify as an
15 impairment. *Pacific Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142,
16 1157 (9th Cir. 2013). However, a mental or physical impairment which is merely
17 transitory—meaning it has an actual or expected duration of six months or less—
18 does not qualify as a disabling impairment under the ADA. 42 U.S.C. §
19 12102(3)(B). In construing whether an impairment qualifies as a disability under
20

1 the ADA, courts should broadly construe the law in favor of coverage. *Id.* at
2 (4)(A).

3 “Major life activities” include, but are unlimited to, “caring for oneself,
4 performing manual tasks, seeing, hearing, eating, sleeping, walking, standing,
5 lifting, bending, speaking, breathing, learning, reading, concentrating, thinking,
6 communicating, and working.” 42 U.S.C. § 12102(2)(A); *see also* *Fraser v.*
7 *Goodale*, 342 F.3d 1032, 1039-40 (the activity should not just be of comparative
8 importance, but instead of central importance; for example, while eating is a major
9 life activity, eating chocolate cake is not). A person is substantially limited as to a
10 major life activity if they are either unable to perform the activity or ““significantly
11 restricted as to condition, manner, or duration under which [they] can perform [the]
12 . . . activity as compared to the condition, manner or duration under which the
13 average person in the general population can perform that same major life
14 activity.”” *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 885 (9th Cir.
15 2004) (quoting 29 C.F.R. § 1630.2(j) (brackets omitted)).

16 A record of impairment may be established “if the individual has a history
17 of, or has been misclassified as having, a mental or physical impairment that
18 substantially limits one or more major life activities.” 29 C.F.R. § 1630.2(k)(1);
19 *see Coons*, 383 F.3d at 886 (plaintiff did not introduce a record of an impairment
20 substantially limiting any major life activity where the only evidence proffered was

1 a letter from his doctor stating that he suffered from various impairments without
2 references to said activities). Plaintiffs may also establish disability by “being
3 regarded” as having such an impairment. 42 U.S.C. § 12102(2)(C). To establish
4 disability under the “regarded as” prong, a plaintiff must show that the entity
5 mistakenly perceived him as having either “a physical impairment that
6 substantially limits one or more major life activities, or . . . an actual, nonlimiting
7 impairment substantially limits one or more major life activities.” *Coons*, 383 F.3d
8 at 886 (quoting *Sutton*, 527 U.S. at 489).

9 According to a declaration provided on Plaintiffs’ behalf from Brendon
10 Scholtz, a licensed psychologist and consultive examiner for the Social Security
11 Division of Disability Determination Services, Mr. Shafer was suffering from a
12 host of mental disorders, including depressive disorder, a stress or trauma disorder,
13 and alcoholism. *See* ECF No. 38 at 2, ¶¶ 5-7. Mr. Scholtz stated that his
14 conclusions were based on interviews with and investigations of Mr. Shafer’s close
15 friends and family. *Id.* at 3, ¶ 10. Dr. Scholtz also averred,

16 [T]he mental impairments Mr. Shafer was suffering from were a
17 substantial limitation in his daily activities. They substantially limited
18 [his] ability to engage in meaningful and appropriate social and
19 interpersonal functioning. This limitation is seen in Mr. Shafer’s
20 estrangement from his wife of over 20 years, his alcohol abuse, his
reaching out for crisis services, his plans to enter substance abuse
treatment, his re-experiencing and attempts to avoid triggering
memories of abuse, his chronic depressive symptoms, his taking
prescribed psychotropic medications, his expression of hopelessness,

1 his suicidal thoughts and ideations, his inability to be a functioning
2 parent, and his extreme emotional lability.

3 *Id.* at 3, ¶ 9.

4 As aforementioned, the Court will not consider inadmissible evidence in
5 ruling on a motion for summary judgment. *Orr*, 285 F.3d at 773. The Court finds
6 that Dr. Scholtz's declaration is inadmissible because it lacks any underlying
7 factual support. *See* FED. R. EVID. 702(b), (c) (the expert's testimony must be
8 "based on sufficient facts or data" and "the product of reliable principles and
9 methods"); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 147 (1997) ("Nothing
10 in either *Daubert* or the Federal Rules of Evidence requires a district court to admit
11 opinion evidence that is connected to existing data only by the *ipse dixit* of the
12 expert."). Dr. Scholtz vaguely asserts that he based his conclusions on
13 "investigations and interviews with individuals who regularly interacted with Mr.
14 Shafer." ECF No. 38 at 3, ¶ 10. Although interviews may be "a typical source of
15 information" for psychologists proffering an expert opinion, as Dr. Scholtz claims,
16 Plaintiffs leave to the imagination virtually all information regarding these
17 apparent interviews and investigations, including who was interviewed, what
18 questions were asked and answers elicited, and what interview methods were used,
19 among other things. Indeed, Dr. Scholtz himself admitted that he was waiting on
20 outstanding medical records to confirm his own conclusions, which suggests to the

1 Court that his conclusions were, at best, precursory. *Id.* at 2, ¶ 5. *See I.V. v.*
2 *Wenatchee Sch. Dist. No. 246*, 342 F. Supp. 3d 1083, 1092 (E.D. Wash. 2018)
3 (declining to admit an expert declaration which rested upon the party's own
4 assumptions and recitation of the facts). As such, the Court does not credit Dr.
5 Scholtz's declaration in its analysis of whether Plaintiff was disabled.

6 Some uncontested circumstantial evidence does tend bolster Plaintiffs'
7 claims of disability; for instance, when Mr. Palmer was interviewed he noted that
8 Mr. Shafer had a history of suicidal ideation and sought help from his church
9 community before. ECF No. 36-2 at 4-5, 2:15. Additionally, some other evidence,
10 such as the fact that Mr. Shafer was about to enter inpatient treatment and that
11 Pastor Putnam indicated to dispatch that he had a history of suicide attempts, also
12 buoys Plaintiffs' assertions. ECF No. 32-1 at 2, ¶ 3.

13 Nevertheless, the evidence presented is insufficient to raise a genuine issue
14 of material fact as to whether Plaintiff's disability was merely long-term, as
15 compared to merely transitory, and, more importantly, whether it substantially
16 limited Plaintiff in any major life activity. Respecting the transitory nature of the
17 disability, Plaintiff proffered no evidence regarding how long Mr. Shafer had been
18 battling his mental illnesses, except to assert that the root of his disorders stemmed
19 from childhood traumas. ECF No. 17 at 4-5. While the second amended
20 complaint implies that these struggles were possibly an ongoing issue for Mr.

1 Shafer throughout his adult life, the only direct evidence in the record on this point
2 came from Mr. Palmer, who indicated that his initial conversation with Mr. Shafer
3 regarding his suicidal ideation “goes back, I really don’t remember, but months
4 ago.” ECF No. 36-2 at 4-5, 2:15; *see also* 42 U.S.C. § 12102(3)(B).

5 More importantly, Plaintiffs did not establish a genuine issue of material fact
6 as to whether Mr. Shafer was substantially limited in any major life activity by
7 reason of his disorders. There is some circumstantial evidence that Mr. Shafer’s
8 thinking and communication skills were impaired, including his ability to care for
9 himself. However, much of this evidence is attributable to the fact that Mr. Shafer
10 was inebriated during his confrontation with Officer Martin and possibly also due
11 to the fact that he was experiencing an urgent and extreme but impermanent mental
12 health crisis. *See* ECF No. 17 at 5, ¶¶ 4.7; 4.11 (referring to Mr. Shafer’s condition
13 on October 23, 2019 as a “mental health crisis” and noting that it was a pattern for
14 him to relapse and experience suicidal ideation while intoxicated). The Court lacks
15 any evidence as to what Mr. Shafer’s functioning was like on a day-to-day basis
16 when he was sober. In fact, the amended complaint indicates that Mr. Shafer’s life
17 was “meaningful and productive” in spite of his struggles and that his family and
18 church community were a strong support system. *Id.* at 4, ¶ 4.2. Because a
19 plaintiff must show the existence of an impairment which substantially limited one
20 or more of his major life activities to establish a disability under the ADA, the

1 Court cannot credit Plaintiffs' claims of disability. 42 U.S.C. § 12102(2)(A); *see*
2 *also, e.g., Lookabill v. City of Vancouver*, No. 13-5461-RJB, 2015 WL 4623938 at
3 *8 (W.D. Wash. Aug. 3, 2015) (unreported) (plaintiff failed to establish that
4 decedent had PTSD when the only evidence of impairment was decedent's
5 partner's report to the responding officers that he was disabled).³

6 To be clear, the Court does not doubt that Mr. Shafer was afflicted with
7 mental impairments which informed his actions on October 23, 2019. But
8 Plaintiffs failed to establish a genuine issue of material fact as to whether any of
9 those impairments (1) were long-term and (2) substantially limited any major life
10 activities. As such, the Court finds that Plaintiff was not disabled under the ADA.

11 **2. Mr. Shafer could not be reasonably accommodated.**

12 Even if Plaintiffs could summon some concrete evidence proving Mr. Shafer
13 was disabled under the ADA, permitting them leave to amend their claims would
14 prove futile because they cannot establish that Mr. Shafer entitled to reasonable
15 accommodations under the circumstances of this case.

16 As abovementioned, plaintiffs may bring claims under Title II of the ADA
17 for reasonable accommodation where police "fail to reasonably accommodate the
18

19 ³ The pleadings also suggest that Mr. Shafer could no longer work due to a
20 back injury, but that physical impairment appears unrelated to Plaintiffs' claims.

1 person's disability in the course of investigation or arrest causing the person to
2 suffer greater injury or indignity in that process than other arrestees." *Sheehan*,
3 743 F.3d at 1232. "[T]he plaintiff bears the initial burden of producing evidence of
4 the existence of a reasonable accommodation," which the public entity may defeat
5 by showing that the suggested modifications "'would fundamentally alter the
6 nature of the service.'" *Id.* (quoting 28 C.F.R. § 35.130(b)(7)). Additionally,
7 current regulations also excuse law enforcement from making a reasonable
8 accommodation when the individual poses a "direct threat to the health or safety of
9 others." 28 C.F.R. § 35.139(a). In determining whether a direct threat exists,
10 public entities must undertake "an individualized assessment, based on reasonable
11 judgment that relies on current medical knowledge or on the best available
12 objective evidence, to ascertain: the nature, duration, and severity of the risk; the
13 probability that the potential injury will actually occur; and whether reasonable
14 modifications of policies, practices, or procedures or the provision of auxiliary aids
15 or services will mitigate the risk." *Id.* at (b).

16 The video evidence establishes that Mr. Shafer posed a direct threat to his
17 neighbors and responding officers. Mr. Shafer was inebriated and pointing a gun
18 at homes in a residential neighborhood near an elementary school and on a public
19 road. *See* ECF No. 32-2 at 9:47-9:56. When instructed to drop the firearm, he
20 refused to comply and instead turned it on Officer Martin. *Id.* Though we now

1 know the pistol to be unloaded, Mr. Shafer's close range to residential homes⁴ and
2 responding officers posed a direct threat that Defendant reasonably confronted
3 through the use of lethal force. *Compare Vos*, 892 F.3d at 1037 (remanding for the
4 district court to consider whether officers reasonably accommodated the decedent,
5 who barricaded himself in a gas station store and then charged out of the store
6 towards officers standing approximately 30 feet away while holding a pair of
7 scissors) with *Lookabill*, 2015 WL 4623938 at *9 (veteran decedent, who was
8 armed, suicidal, and erratic, posed a direct threat to the officers and others).

9 Plaintiffs concede that Officer Martin's use of force was reasonable from the
10 moment the gun was turned on him, but focus instead on Officer Martin's pre-
11 confrontation conduct, arguing that he should have waited for the third officer to
12 arrive on scene, verbally or otherwise communicated with Officer Cole about a
13 strategy for approaching Mr. Shafer, and opened a line of communication with Mr.
14 Shafer on the phone. ECF No. 35 at 14-18. Plaintiffs also insist that Officer
15 Martin should have listened to the rest of Mr. Shafer's phone conversation with

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⁴ Plaintiff's expert insinuates that Officer Martin was a safe distance away
18 because he stood behind a small car several driveways from where Mr. Shafer
19 stood. ECF No. 37-1 at 13. But as the circumstances of Mr. Shafer's death
20 indicate, distance becomes less significant where firearms are involved.

1 Mr. Palmer, which they believe would have made it apparent that Mr. Shafer was
2 not looking to get into a confrontation with police, but instead walking down the
3 driveway to see his friends. *Id.* at 5-8, 16. Finally, Plaintiffs fault Officer Martin
4 for failing to identify himself. ECF No. 17 at 8, ¶ 4.26. Given the nature of the
5 threat posed, the Court finds that these were not reasonable accommodations which
6 could have been made to deescalate the situation.

7 Regarding Officer Martin's failure to continue to listen to Mr. Shafer and
8 Mr. Palmer's phone conversation and failure to identify himself after approaching
9 Mr. Shafer, the Court does not find that a reasonable jury could conclude Plaintiffs
10 are entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). Irrespective of
11 the fact that listening to the phone conversation further might have alerted Officer
12 Martin as to Mr. Shafer's purpose in walking down the middle of his driveway, the
13 video footage captures him pointing a gun down the street towards his neighbors'
14 homes. *See* ECF 32-2 at 9:47. The reasonable inference is that Mr. Shafer was
15 either looking to get into a confrontation with friends, neighbors, or law
16 enforcement, regardless of his stated intentions.

17 For similar reasons, the exigent nature of the confrontation did not obligate
18 Officer Martin to pause and introduce himself. Officer Martin was wearing his law
19 enforcement uniform, cap, and tactical gear. *See* ECF No. 32-2 at 5:02 (capturing
20 Officer Martin's reflection in his car window). Moreover, Mr. Shafer was well-

1 aware that law enforcement was on scene. Indeed, he specifically said to Mr.
2 Palmer that he was “waiting for the cops.” ECF No. 32-2 at 8:02-8:10.

3 The Court likewise does not find that Officer Martin’s failure to open a line
4 of communication, speak with Officer Cole, or wait for Officer Pavlischak violated
5 the ADA. Ideally, Officer Martin would have had the opportunity to speak to Mr.
6 Shafer over the phone or to strategize with Officer Cole prior to the time Mr.
7 Shafer began brandishing the gun towards his neighbors’ homes. But from the
8 time that Officer Martin relayed to dispatch that Mr. Shafer was waiting for the
9 police with his pistol, ECF No. 32-2 at 8:13-8:16, to the time that he saw Mr.
10 Shafer in the driveway and began approaching him, *id.* at 9:20, only approximately
11 sixty seconds had passed. As it stands, the direct threat posed by Mr. Shafer’s
12 actions did not provide law enforcement a reasonable amount of time to provide
13 any accommodations. *Compare Vos*, 892 F.3d at 1029-30 (officers were on scene
14 for approximately twenty minutes prior to shooting) *with* ECF No. 32-2 (Officer
15 Martin was on scene for a total of approximately five minutes prior to shooting).
16 Finally, given that Officer Pavlischak did not arrive until the confrontation with
17 Mr. Shafer was underway, it was not unreasonable for Officer Martin to fail to wait
18 for him. Accordingly, the Court dismisses Plaintiffs’ ADA claim on the basis that
19 Mr. Shafer posed a direct threat to the public and the responding officers.

20 //

1 **C. Rehabilitation Act Claim**

2 Plaintiffs and Defendant agree that any analysis governing a claim under the
3 Rehabilitation Act is virtually identical to one under the ADA, except that a party
4 bringing a claim under the Rehabilitation Act must also prove that the relevant
5 entity receives federal funding. *See* ECF Nos. 30 at 19; 35 at 18; *see also Payan v.*
6 *Los Angeles Cnty. Coll. Dist.*, 11 F.4th 729, 738 (9th Cir. 2021) (explaining that
7 the elements of a *prima facie* Rehabilitation Act and Title II ADA claim are the
8 same except for the federal financial assistance requirement). The Court thus
9 dismisses the Rehabilitation Act claim for the reasons discussed above.

10 **D. Negligence Claim**

11 Due to the dismissal of Plaintiffs' ADA and Rehabilitation Act claims, the
12 Court no longer has federal question jurisdiction over this action. 28 U.S.C. §
13 1331. Rather than retaining supplemental jurisdiction, the Court dismisses the
14 remaining negligence claim without prejudice. *See* 28 U.S.C. §§ 1367(c)(3), (d)
15 ("The period of limitations for any claim asserted under subsection (a) . . . shall be
16 tolled while the claim is pending and for a period of 30 days after it is dismissed
17 unless State law provides for a longer tolling period.").

18 **ACCORDINGLY, IT IS HEREBY ORDERED:**

19 1. Defendant's motion for summary judgment is **GRANTED**. Plaintiffs'
20 ADA and Rehabilitation Act claims are **DISMISSED**.

1 2. Plaintiffs' state law negligence claim is dismissed **WITHOUT**
2 **PREJUDICE.**

3 The District Court Executive is directed to enter this Order, enter judgment,
4 furnish copies to counsel, and **CLOSE** the file.

5 DATED November 8, 2023.



6 A handwritten signature in blue ink that reads "Thomas O. Rice".
7 THOMAS O. RICE
8 United States District Judge

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